

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs March 9, 2007

KINA NICOLE AIBANGBEE v. KENNETH OMARI AIBANGBEE

Appeal from the Circuit Court for Davidson County
No. 05D3417 Carol Soloman, Judge

No. M2005-02598-COA-R3-CV - Filed on April 20, 2007

The trial court granted a wife's petition for an order of protection against her husband. The order included a requirement that the husband pay the wife \$125 bi-weekly in spousal support. The husband argues on appeal that there was no evidence in the record that the petitioner was disadvantaged or that she needed support. However, in the absence of either a Transcript of the Evidence or of a Statement of the Evidence, we must presume that the trial court received sufficient proof to justify its support order. We therefore affirm the trial court.

Tenn. R. App. P. 3 appeal as of Right; Judgment of the Circuit Court
Affirmed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Lorraine Wade, Nashville, Tennessee, for the appellant, Kenneth Aibangbee.

Kina Nicole Aibangbee, appellee.

OPINION

Kina Nicole Aibangbee ("Wife") filed a Petition for an *ex parte* order of protection in the Circuit Court of Davidson County on September 16, 2005. The petition alleged that Ms. Aibangbee's husband, Kenneth Omari Aibangbee ("Husband"), was verbally abusive to her, threatened physical harm, and threatened to put her and her five-year old son out on the street. The petition further alleged that Husband's family members threatened to kill her and take away her son. Wife claimed that these threats were frequent, that they were witnessed by neighbors, and that she had to call the police several times because of them. Wife's petition also stated that she needed support, and asked that "upon hearing of this cause, respondent be ordered to pay reasonable support for petitioner." The trial court granted the temporary *ex parte* order of protection.

On October 5, 2005, presumably after a hearing, the court issued an order of protection, which was declared to be effective for one year. The printed portion of the order recited that the court “has jurisdiction over the parties and subject matter, and the Respondent has been provided with reasonable notice and an opportunity to be heard.” The provisions of the order included a requirement that Husband attend anger management classes for eight weeks and that he pay his wife \$125 every other week for spousal support. Husband has appealed the support order to this court.

II.

Our legislature has set out a variety of provisions which the court may include in an order of protection. These include “[a]warding financial support to the petitioner and such persons as the respondent has a duty to support.” Tenn. Code Ann. § 36-3-606(a)(7). Thus, the trial court had the legal authority to order Husband to pay support to Wife, so long as its order was justified by the circumstances.

Another legislative enactment setting out the possibility of making spousal support a part of a protective order is Tenn. Code Ann. § 36-5-121(g)(1) which reads in pertinent part,

Transitional alimony means a sum of money payable by one (1) party to, or on behalf of, the other party for a determinate period of time. Transitional alimony is awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce, legal separation or other proceeding where spousal support may be awarded, such as a petition for an order of protection.

Like transitional alimony, an order of protection is effective for a determinate period of time. The duration of an order of protection is “. . . not to exceed one (1) year.” Tenn. Code Ann. § 36-3-608(a). We presume the support ordered in this case is properly characterized as transitional alimony or support.

Transitional support is available to assist the economically disadvantaged spouse in an order of protection situation or similar situations. While Tennessee Code Annotated § 36-5-121(i) sets out a long list of factors to consider when making a decision regarding spousal support, our courts have stated many times that the most important considerations are the needs of the obligee spouse and the obligor spouse’s ability to pay. *Perry v. Perry*, 114 S.W.3d 465, 467 (Tenn. 2003); *Robertson v. Robertson*, 76 S.W.3d 337, 342 (Tenn. 2002); *Goodman v. Goodman*, 8 S.W.3d 289, 295 (Tenn. Ct. App. 1999); *Watters v. Watters*, 959 S.W.2d 585, 593 (Tenn. Ct. App. 1997); *Loyd v. Loyd*, 860 S.W.2d 409, 412 (Tenn. Ct. App. 1993).

Husband argues in his appellate brief that the trial court erred in ordering him to pay support because there was no evidence that the Wife was economically disadvantaged, that she needed such support, or that he had the ability to pay it. Wife did not file an appellate brief. Husband acknowledges that trial courts have broad discretion when determining spousal support. *Anderton*

v. Anderton, 988 S.W.2d 675, 682 (Tenn. Ct. App. 1998). “Appellate courts are generally disinclined to second-guess a trial court’s spousal support decision unless it is not supported by the evidence or is contrary to the public policies reflected in the applicable statutes.” *Id.* Spousal support questions are intensely fact-driven.

The record before us includes Wife’s petition, the court’s ex parte order, its subsequent order of October 5, 2005, and an amended version of that order (filed November 2, 2005) which differs from the earlier order only by incorporating the wife’s specific allegations as to the husband’s conduct. There is no Transcript of the Evidence, nor is there a Statement of the Evidence pursuant to Tenn. R. App. P. 24.

Husband argues on appeal that the trial court’s decision was not supported by the evidence “because there was no evidence presented to justify such a ruling.” His burden, however, is to show this court that the evidence in the record preponderates against the court’s award of spousal support.

The absence of a transcript or of a Statement of the Evidence leaves Husband at a distinct and dispositive disadvantage. *See Irvin v. City of Clarksville*, 767 S.W.2d 649, 653 (Tenn. Ct. App. 1988). That is because in most situations, the inadequacy of an appellate record will be attributed to the appellant, whose responsibility it is to prepare a record that is adequate for a meaningful appellate review. Tenn. R. App. P. 24(b); *State v. Bunch*, 646 S.W.2d 158, 160 (Tenn. 1983); *McDonald v. Onoh*, 772 S.W.2d 913, 914 (Tenn. Ct. App. 1989). The result is generally that where factual issues are raised, without an appellate record containing the facts, this court cannot perform a *de novo* review or determine the preponderance of the evidence. *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992). Therefore, in such cases, we assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court’s factual findings. *Id.*; *McDonald*, 772 S.W.2d at 914; *Gotten v. Gotten*, 748 S.W.2d 430, 432 (Tenn. Ct. App. 1988); *Irvin*, 767 S.W.2d at 653.

Herein, we are obligated to assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court’s judgment awarding support to Wife. *Cooper v. Rosson*, 509 S.W.2d 836, 837 (Tenn. 1974); *see also Wilson v. Hafley*, 226 S.W.2d 308, 311 (Tenn. 1949); *Tallent v. Cates*, 45 S.W.3d 556, 562 (Tenn. Ct. App. 2000); *Sherrod v. Wix*, 849 S.W.2d at 783. Stated another way, “[i]n the absence of a transcript or a statement of the evidence, we must conclusively presume that every fact admissible under the pleadings was found or should have been found favorably to the appellee.” *King v. King*, 986 S.W.2d 216, 220 (Tenn. Ct. App. 1998); *McDonald*, 772 S.W.2d at 914.

Given the state of the record before us, we must presume that the trial court received evidence sufficient to justify its support order. We accordingly affirm that order.

III.

The order of the trial court is affirmed. Remand this case to the Circuit Court of Davidson County for any further proceedings necessary. Tax the costs on appeal to the appellant, Kenneth Omari Aibangbee.

PATRICIA J. COTTRELL, JUDGE